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No. 83-5424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GLEN BURTON AKE, *Petitioner*,

v.

STATE OF OKLAHOMA, *Respondent*.

On Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. When an indigent defendant's sanity at the time of the offense is seriously in issue, can a State constitutionally refuse to provide any opportunity whatsoever for him to obtain the psychiatric assistance and examination necessary to prepare and establish his insanity defense?

2. When a State seeks in a capital case to prove the aggravating circumstance of future dangerousness through psychiatric testimony, can it constitutionally refuse to provide an indigent defendant with psychiatric assistance to rebut that testimony and to develop and present mitigating evidence?

3. Can a State constitutionally put a defendant on trial, without making any inquiry into his competency, when he is involuntarily receiving psychoactive medication that renders him unable to participate in his defense and prejudices his appearance before the jury?

PARTIES TO THE PROCEEDING

The only parties to this proceeding, in this Court or below, are the petitioner (defendant below) Glen Burton Ake and the respondent State of Oklahoma.

Steven Keith Hatch was the defendant in a consolidated case arising out of the same events, but was ultimately tried separately.

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

BRIEF FOR THE PETITIONER

DECISIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 663 P.2d 1, and is reproduced in the Joint Appendix at J.A. 66. The Judgment and Sentence of the trial court are reproduced at J.A. 62.

JURISDICTION

The Judgment of the Oklahoma Court of Criminal Appeals was entered on April 12, 1983. A timely petition for rehearing was filed and was denied on June 15, 1983. J.A. 82. On August 12, 1983, Justice White entered an order extending petitioner's time to file a petition for a writ of certiorari until September 13, 1983. The petition was filed on September 13, 1983, and was granted on March 19, 1984. J.A. 83. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution and of the laws of Oklahoma are set forth in the Appendix, *infra*.

STATEMENT OF THE CASE

1. In October, 1979, petitioner Glen B. Ake (pronounced "ache") was twenty-four years old. He was married and employed as an oil driller. His entire prior criminal record consisted of a 1975 conviction for unauthorized use of a motor vehicle. Report of the Trial Judge, at 1, 5.

On October 15, after a day of heavy drinking and drug use, PX 68 at 1-2, 5-6; Tr. 546, 549,[1] Ake and another man entered the home of the Reverend Richard Douglass in Canadian County, Oklahoma. Rev. Douglass, his wife and their two children

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[1] "Tr. ____" indicates references to the trial transcript.

were at home. Ake bound, gagged and shot the members of the Douglass family, killing Rev. and Mrs. Douglass.

These killings were undeniably tragic, and if committed by a person in his right mind, heinous. But Ake's defense—and the only seriously contested factual issue at trial—was that he was legally insane at the time. The question in this Court is whether the State of Oklahoma determined that he was not insane, and that he should be put to death, in a constitutionally acceptable manner.

2. Ake was arrested in Colorado in November 1979 and was returned to Oklahoma. After preliminary proceedings, he was arraigned on February 14, 1980, in the District Court for Canadian County. The court found his behavior at arraignment and in other incidents at the jail to be so "bizarre," J.A. 2, that it *sua sponte* ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as to . . . whether the Defendant may need an extended period of mental observation." *Id.*[2]

Ake was examined by William L. Allan, a psychiatrist appointed by the court, on February 22, 1980. Dr. Allan noted that "[a]t times he appears to be frankly delusional. . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." J.A. 8. Dr. Allan diagnosed probable paranoid schizophrenia and recommended a "more prolonged psychiatric evaluation" to determine Ake's competency to stand trial. J.A. 9. On March 5, Ake was ordered committed to Eastern State Hospital at Vinita. J.A. 2. Pursuant to statute and the court's order, he was examined only with respect to his "present sanity," *i.e.*, his competence to stand trial. *Id.*; Okla. Stat. tit. 22, § 1171 (1971), App. 6a.

On April 1, 1980, Dr. P. D. Garcia, the Chief Forensic Psychiatrist at Eastern State hospital, reported to the court that

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[2] The arraignment was recorded by a court reporter, but her notes were never transcribed and she no longer resides in Oklahoma. Counsel for both parties are attempting to obtain a transcript.

Ake was not competent to stand trial. J.A. 10. The court held a special hearing on April 10 to determine Ake's competency. Dr. Allan, who had consulted with Dr. Garcia, testified:

> [Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis, that he is dangerous.

J.A. 11. Dr. Allan recommended that:

> because of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—the State Psychiatric Hospital system.

J.A. 12. When asked whether Ake could currently tell right from wrong, Dr. Allan responded that he could not:

> Q. [by the Court]: [D]o you have an opinion as to whether Mr. Ake at this time understands the significance or the difference between right and wrong?
>
> A. At this time?
>
> Q. At this time?
>
> A. I have to give a qualified opinion because—uh—all of his statements are co[u]ched in terms of his religious beliefs which are delusional and his concept of right and wrong does not accept the Court's authority of government.
>
> Q. I see.
>
> A. So, he just doesn't accept what the rest of us live by.
>
> . . .
>
> Q. [D]o I interpret your answer to say that in terms of society's judgment as between right and wrong, whatever things he may have are not on that level but are somewhat different?
>
> A. Yes. His wor[l]d would be a different dimension. He does not, as I understand it, accept the ordinary rules of right and wrong.

J.A. 13-14. Neither Dr. Allan nor Dr. Jack Enos, a non-psychiatrist M.D. who also testified that Ake was mentally ill

and dangerous, *see* Tr. of Mental Health Hearing at 24-25, was asked anything about Ake's mental condition at the time of the offense.

The court found Ake to be "a mentally ill person in need of care and treatment" and ordered him re-committed to the State mental hospital. J.A. 15. Pursuant to statute, all criminal proceedings were suspended. Okla. Stat. tit. 22 § 1171 (1971), App. 6a.

Six weeks later, Dr. Garcia reported to the court that Ake had become competent to stand trial. He noted that Ake was being maintained on 200 milligram doses of Thorazine administered three times daily, and recommended that this dosage be continued. J.A. 16. Without further inquiry, the criminal proceedings against Ake were ordered resumed. J.A. 3.

3. A pre-trial conference was held on June 13, 1980. Ake's court-appointed counsel informed the court that in order to prepare an adequate insanity defense, he needed the assistance of a psychiatrist to examine Ake with respect to his mental condition at the time of the offense. J.A. 17. During Ake's three-month stay at the State hospital, no such examination had been performed. Counsel urged that, in view of petitioner's indigency,

> the court can award us money to prepare a proper defense. And, at this time I am going to ask the court to grant us a reasonable amount of funds [with] which to pay [a] psychiatrist . . .

J.A. 17. The Judge expressed doubt that he had the authority under State law to grant the request, J.A. 17, 18, but counsel argued that the court was required to do so under the federal Constitution:

> Glen Ake, indigent [with] court-appointed counsel; still under the constitution is entitled to monies for a psychiatrist as if he were another Cullin Davis who had the money to pay for it.[3]
>
> . . .
>
> To deny to this client the . . . funds for the preparations would be a miscarriage of justice . . . because an attorney has got to have, as the court knows, funds to properly defend his client. And, in a Murder One case, I hear the word "expense," and I cannot possibly believe that in anybody's heart a few meager dollars is going to stand between a man charged with Murder in the First Degree, of insuring him of a constitutional, fair and impartial trial, and being [un]prepared because of a few dollars that they think might be spent of the taxpayers' money.

J.A. 17, 19.

The motion was denied.[4] The court agreed that the defendant was entitled to a psychiatric examination, if he could afford it, J.A. 3-4, 21, but felt bound by State law that, in the court's own words, was "almost cripplingly restrictive" with respect to providing funds for defense expenses. J.A. 20. The Court rejected petitioner's federal constitutional claim on the authority of *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953), "in which the U.S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants." *Id.* Nevertheless, recognizing the relevancy and materiality of the requested psychiatric examination to Ake's insanity defense, the court ruled that counsel could "have the defendant available, if you are able to arrange [the psychiatric examination] in some other manner." J.A. 21.

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[3] T. Cullin Davis is a Texas millionaire who was charged with the murder of his step-daughter and acquitted by a jury. *See* D. Phillips, *The Great Texas Murder Trials* (1979).

[4] Anticipating the denial of his motion for a defense expert, counsel requested, as a fall-back alternative, an examination with respect to Ake's sanity at the time of the crime by a neutral, court-appointed psychiatrist. J.A. 18. This request was also denied.

4. Jury selection for Ake's trial began on June 23, 1980. Tr. 25. On June 24 and 25, the State put on twenty-three witnesses to prove the virtually uncontested fact that Ake had committed the homicides in question. Tr. 279-550. The entire defense case—and the entirety of the evidence on petitioner's insanity defense—was presented to the jury between 11:05 a.m. and 2:15 p.m. on June 25, with a recess for lunch in the middle. Tr. 552-609, 571.

The defense called three witnesses: Dr. Allan, Dr. Enos, and Dr. Garcia. Each testified that Ake was mentally ill, but none was able to express an opinion about Ake's sanity at the time of the offense because none had examined him for that purpose. The prosecution repeatedly called to the jury's attention the fact that the doctors could not testify about Ake's condition at the time of the offense, thereby fueling the unwarranted inference that his insanity defense was without merit. The prosecution pressed each witness to admit that he had not performed or seen the results of any examination diagnosing Ake's mental state in October 1979—the very examinations Ake had requested and the State had denied.

Thus, Dr. Allan testified that when he examined Ake, in February and April, Ake had been mentally ill and "very dangerous." J.A. 35, 36, 37. He testified that, at those times, Ake thought he was "literally the sword of vengeance," J.A. 34, and "really didn't accept the authority of any earthling, court, or government, or person." J.A. 39. Dr. Allan testified that Ake's illness might have been present since the age of seven. J.A. 35, 38. But on cross-examination by the District Attorney, he admitted that he had no opinion about whether Ake knew right from wrong on October 15, 1979:

> Q. Doctor, your test at the time of your interview . . . was your test to ascertain whether he knew right from wrong?
>
> A. No, it was not.
>
> Q. It was whether he had a mental illness, is that correct?

> A. Yeah, . . . in neither case did I specifically go into detail, try to get answers as to his ability to know right from wrong at the time of the alleged act.
>
> Q. So, that was not your concern, is that correct?
>
> A. That's right.

J.A. 37-38.

Dr. Enos testified that in his opinion Ake was a paranoid schizophrenic, J.A. 42, who, at the time of his interview with Enos in April, communicated only with God. J.A. 41. On cross-examination, he, too, readily conceded that his examination and opinion did not relate to Ake's mental state in October 1979:

> Q. Then your examinations, or your conclusions are not whether he knew right from wrong?
>
> A. No.
>
> Q. And, certainly wouldn't relate to the months of October—
>
> A. Not at all.
>
> Q. —or November 1979, as to whether he knew right from wrong?
>
> A. That's correct.
>
> . . .
>
> Q. Is there any place, in any report you have ever seen, or anything you have had the benefit to review, that has said "this defendant was legally insane in October or November of 1979?"
>
> A. No, sir.
>
> Q. Do you have any opinion as to whether—
>
> A. No, sir.

J.A. 46.

The final defense witness was Dr. R. D. Garcia, Chief Forensic Psychiatrist at Eastern State Hospital, where Ake had been a patient for three months. J.A. 47. Dr. Garcia agreed

with the diagnosis of Drs. Allan and Enos that Ake was mentally ill with "schizophrenia, paranoid type." He testified that Ake's symptoms were full-blown "paranoid delusions, hallucinations, and so forth, and so on." J.A. 49.

Dr. Garcia testified that while at Eastern State Hospital, Ake had been carefully evaluated and had been subjected to a broad range of physiological and psychological tests. J.A. 48, 50.[5] But Ake had never been examined or evaluated with respect to his mental condition at the time of the charged offenses. J.A. 53. On cross-examination, the District Attorney repeatedly drove home the fact that Dr. Garcia, like the other medical witnesses, was unable to express any opinion about Ake's sanity the previous October:

> Q. For what purpose did you receive [Ake]?
>
> A. For the purpose of psychiatric determination, or observation and testing, in order to determine whether he was insane, or not.
>
> Q. Incompetent to aid in his defense?
>
> A. Yes, sir.
>
> Q. Okay. Not legally insane as knowing right from wrong, but just incompetent to aid in his defense, is that correct?
>
> A. Yes, sir.
>
> Q. Was there any call at that time for a diagnosis as to October or November 1979? Were you looking into that?
>
> A. No, sir . . .
>
> Q. Have you done any testing or evaluation of Glen Burton Ake as towards legal insanity at the time of the commission of the offense?
>
> A. No, sir, we were not able to.

[5] Dr. Garcia testified that the results of these tests and clinical observations had ruled out the possibility that Ake was malingering or faking mental illness. J.A. 48, 51.

> Q. Do you have any opinion as to Glen Burton Ake's mental insanity at the time of the offense—October or November?
>
> A. No, I would not say . . .
>
> . . .
>
> Q. Doctor, did you do any tests to determine whether the person that is seated here, Glen Burton Ake, was mentally insane at the time of this incident?
>
> A. No, sir, we were not able to—
>
> Q. Okay. You have no opinion.
>
> A. —make any examination.
>
> Q. And, you have no opinion as to that, is that true?
>
> A. No, sir.

J.A. 52-53.

Indeed, the prosecuting attorneys believed that they had shown so clearly that the doctors' testimony was irrelevant to the issue before the jury that they moved to have their testimony stricken from the record. J.A. 39, 54.

The defense then rested. The defendant did not testify. As his counsel explained at the bench,

> [D]ue to the uncooperative nature of the defendant, and the lack of communication . . . defense counsel at this time is unable to put the defendant on the witness stand, or to determine whether or not he in fact wants to execute [*sic*] his Constitutional right to testify in his behalf . . . We cannot get a yes or no if he wants to take the stand, so we rest.

J.A. 54-55. Even the prosecution was taken aback at the brevity of the defense case:

> MR. GOERKE: (Out of the hearing of the jury) Based upon that only? Based upon that only, you rest?
>
> MR. BREWER: (Out of hearing of the jury) Yes, sir.

J.A. 55. The State put on no evidence in rebuttal. Tr. 611.

5. During his trial, Ake was involuntarily sedated with 200 milligrams of Thorazine, administered three times a day. J.A. 49, 52. "Thorazine is a major tranquilizer used in people who are psychotic, as opposed to neurotic." J.A. 41 (testimony of Dr. Enos).[6] A normal person would become "extremely drowsy" on a single daily dose of that size, and "three times as drowsy" on the dose administered to Ake. J.A. 42. Ake "remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings." *Ake* v. *State*, 663 P.2d at 6, J.A. 71.

Defense counsel repeatedly protested this situation during the trial, calling the court's attention to the fact that they were utterly unable to communicate with their client. For example, when the court was about to hear testimony in chambers on the admissibility of Ake's post-arrest statement, defense counsel were asked if they wished the defendant to be present. They replied:

> MR. BREWER: We waive presence of our—he ain't going to talk to us anyway. He doesn't know what is going on. He is goofier than hell. We don't need him, and he can't assist us. We have already told the Court that he doesn't possess the ability to aid and assist in a jury trial. Has he ever talked to you, Mr. Strubhar?
>
> MR. STRUBHAR: No.
>
> MR. BREWER: He has never even talked to me. Never said hello.

J.A. 27. And *see* J.A. 54-55, 26 ("while he takes this tranquilizer, he becomes a zombie") (remarks of defense counsel), Tr. 501. Even the trial judge agreed that "we have had all along a real question as to whether the man had any kind of mental capacity." Tr. 495.

6. At the close of the evidence in the criminal responsibility phase of the trial, the judge charged the jury, in accordance with Oklahoma law, that the defendant could be found not

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[6] Thorazine is the registered trademark for a brand of chlorpromazine manufactured by Smith Kline & French Laboratories. *See Physicians' Desk Reference* 1896 (38th ed. 1984).

guilty by reason of insanity only if he did not have the ability to distinguish right from wrong at the time of the alleged offense. J.A. 57. The jury was instructed that Ake was to be presumed to have been sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time; if he raised such a doubt, the burden would shift to the State to prove, beyond a reasonable doubt, that he had been sane. J.A. 57-58; *see Ake* v. *State*, 663 P.2d at 10, J.A. 78.

In his closing argument, the District Attorney argued to the jury that the psychiatrists' inability to express an opinion about Ake's sanity at the time of the offense proved that no reasonable doubt as to his sanity existed:

> Do you remember my persistence in asking, for instance, Dr. Allan, "Do you have an opinion as to whether he knew right from wrong at the time—during October and November of 1979?" "No." The same question was asked of Dr. Garcia. The same question was asked of Dr. Enos. None had an opinion as to whether he knew right from wrong in October or November of 1979.
>
> So, bearing in mind we are looking at a test of knowing right from wrong on October 15, 1979 . . . realizing the consequences of those acts, is there a probable—a reasonable doubt created? None of the doctors had any opinion. Remember? Each one was distinctly asked, "Do you have any opinion as to whether the defendant knew right from wrong in October and November, 1979?" None of them did.

J.A. 55.[7]

The Jury rejected Ake's insanity defense and returned a verdict of guilty on all counts.

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[7] The District Attorney also implied to the jury that Ake would go free if he were found not guilty by reason of insanity:

> Mr. Brewer says, "That won't happen. They won't just turn him loose." The Judge has taken care of that in Instruction 12A—read that. Send him to a mental institution—well, we have been there. They sent him April 10th. They sent him back June 9th, and said he is still mentally ill, but he is ready to go back. He

7. The sentencing stage of Ake's trial began late that same afternoon. It did not last long. Neither the State nor the defense put in any new evidence. Both sides rested on the evidence previously presented. Tr. 703-04.

In urging the jury to return the death penalty, the prosecution explicitly relied on the testimony of the psychiatrists to establish an aggravating circumstance, namely that "there is a high probability that [Ake] would again commit criminal acts of violence." Tr. 717. The State reminded the jury of "the testimony of the three psychiatrists who have evaluated Glen Ake's mental illness, and say he is dangerous to society"; "each one . . . stated, this defendant, Glen Burton Ake, is dangerous, he is volatile." Tr. 716, 714 (closing argument); *see* J.A. 37, Tr. 601 (doctors' testimony).

Petitioner had no expert witness to rebut this testimony. Moreover, his counsel was deprived of the expert psychiatric assistance necessary to develop and present mitigating evidence, such as Ake's mental state at the time of the offense, or the psychological effects of the child abuse Ake had suffered at the hands of his father (*see* Tr. 559). Again, the cause of this limitation of the available psychiatric evidence was the State's refusal to provide the defense with funds to obtain a psychological examination on these matters, combined with the State law that restricted the scope of the examination conducted by the State and court-appointed psychiatrists to the question of competency to stand trial.

The jury found three aggravating circumstances, including the likelihood that Ake would commit future acts of violence,

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is sedated. If we hadn't had these charges pending, he would have gone out on the street a free man.

MR. BREWER: I'll object to that, if the Court please.

THE COURT: Overruled.

MR. GOERKE: If the charges hadn't been pending on June 9th he would have gone back out on the street.

J.A. 56.

J.A. 60.[8] The jury fixed Ake's punishment at death for each of the two murder counts, and at 500 years imprisonment for each of the two counts of shooting with intent to kill. J.A. 61, Tr. 696-97.[9]

On July 25, 1980, the trial court denied Ake's motion for a new trial and sentenced him, in conformity with the jury's verdicts, to death by lethal injection. J.A. 63.

8. On appeal to the Oklahoma Court of Criminal Appeals, Ake contended that "he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist . . . as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses." *Ake* v. *State*, 663 P.2d at 6, J.A. 71. The court disagreed:

> We have held numerous times that the unique nature of capital crimes notwithstanding, the State does not have

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[8] The other aggravating circumstances found were that the crime was committed to avoid arrest and that the murders were especially cruel, heinous and atrocious. J.A. 60.

[9] As the sentencing phase of the trial began, the courthouse air conditioning broke down. Tr. 698. The temperature outside was 104° Fahrenheit. (Datum from U.S. Dep't of Commerce, National Climatic Data Center.) When the jurors retired into the windowless jury room during a brief chambers conference, they sent a note to the court after a few minutes asking to be allowed to return to the courtroom because the jury room was insufferably hot. Tr. 708. Counsel noted "they may be ready to pass out," and "I'm about to die myself." Tr. 706. The court agreed that "[i]t is unbearable in here." Tr. 711. The court suggested to the jurors that they recess for supper and then spend the night sequestered at a motel. *Id.* But to avoid being sequestered overnight, the jurors chose instead to conclude the trial. Tr. 712. After closing arguments, the jury was returned to the same stifling jury room to decide upon the life or death of the defendant. The verdict of death was returned forty minutes later. *Daily Oklahoman*, June 27, 1980, at 1.

> the responsibility of providing such services to indigents charged with capital crimes.

Id. The court found that Ake had "failed to establish any reasonable doubt as to his sanity at the time the crimes were committed," *id.* at 10, J.A. 78, but ignored the fact that his attempt to do so was thwarted by the State's refusal to have him examined on that issue by even a single psychiatrist or psychologist.

The court emphasized, as had the prosecution at trial, the inability of any of the doctors who testified to give "an opinion as to [Ake's] ability to distinguish between right and wrong at the time of the shootings." *Id.* Yet this failure of evidence resulted solely from petitioner's indigency: Oklahoma refused to appoint a psychiatrist to evaluate Ake's mental condition at the time of the offense and he lacked the funds to retain one.[10]

Petitioner also contended on appeal that the Thorazine he was given during his trial rendered him unable to understand the proceedings against him or to assist counsel with his defense. He also complained that his drugged and "hypnotic" state prejudiced him in the eyes of the jury. Brief of Appellant at 18-23. The Court of Criminal Appeals rejected these arguments, relying on Dr. Garcia's May 22 letter which stated that

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[10] The court did not explain how it could conclude that Ake had not raised even a reasonable doubt about his sanity when he had been adjudged incompetent to stand trial after "bizarre" behavior at arraignment, when three doctors had testified that he was a paranoid schizophrenic, when Dr. Allan had testified that his mental illness might extend back to his childhood and therefore could have been "apparent" on the day of the offense, J.A. 38, and when the State's Chief Forensic Psychiatrist had testified, in answer to a hypothetical question, that a person in Ake's condition at the time of the offense might not have been able to tell right from wrong, J.A. 54.

Of course, if the Court of Criminal Appeals had concluded that Ake *had* raised a reasonable doubt about his sanity, it would have been obliged to reverse his conviction, since the State had not put on evidence that could establish his sanity beyond a reasonable doubt.

under the influence of Thorazine Ake was competent to stand trial, and on the supposed absence of evidence "that any change in his competency occurred in the month between his release from Vinita [hospital] and his trial." 663 P.2d at 7, J.A. 72. The Court could not ignore the fact that Ake "stared vacantly ahead throughout the trial," *id.* at 7 n.5, J.A. 73, but it refused to concede any possibility that the Thorazine was responsible. Rather, the court conjectured, Ake's behavior might have been "simulated to delay justice," *id.* at 8, J.A. 74:

> It is quite possible that the defense of insanity interposed by the appellant fostered such behavior on his part.

Id. at 7 n.4, J.A. 72. But there is absolutely no basis in the record for such an insinuation. To the contrary, the State's own Chief Forensic Psychiatrist testified that a series of sensitive psychological tests and clinical observations had unequivocally ruled out the possibility that Ake's mental illness was feigned. J.A. 48, 51.

Ake's other allegations of error were similarly rejected, and the judgments of guilt and the sentences of death were affirmed. 663 P.2d at 12, J.A. 81. This Court granted Ake's motion for leave to proceed *in forma pauperis* and his petition for a writ of certiorari. J.A. 83.

SUMMARY OF ARGUMENT

1. A defendant's right to a fair criminal trial is guaranteed against the States by the Fourteenth Amendment. *Powell* v. *Alabama*, 287 U.S. 45 (1932). To secure a fair trial, indigent defendants must be provided with the assistance that is essential to the "proper functioning of the adversarial process." *Strickland* v. *Washington*, No. 82-1554, slip op. at 16 (U.S. May 14, 1984). This Court has previously recognized that such necessary assistance includes counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and the transcripts of prior proceedings, *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

In a proper case, the assistance of an expert is equally fundamental and essential. When a case involves disputed

factual issues of a sort that lay people do not have the knowledge, training or experience to understand fully without expert assistance, it is fundamentally unfair to put a defendant on trial without assuring that he and his counsel have the means to prepare and present those issues to the factfinder intelligibly and upon fairly adversary terms. The provision of such assistance is also required to fulfill the law's promise that justice not be reserved for the wealthy. *Griffin* v. *Illinois*, *supra*.

In this case, the assistance of a psychiatrist or psychologist was manifestly necessary. Glen Ake's only defense to a capital charge was that he had been insane at the time of the alleged offense. It was beyond dispute that he was severely mentally ill. He had been adjudged incompetent to stand trial, and had been committed to the State mental hospital for three months between arraignment and trial. In this case, the assistance of a qualified mental health professional was as essential as the assistance of an attorney to a real test—a "trial" in the original meaning of the word—of the merits of his insanity defense. Ake was therefore denied a fair trial by the State's refusal to provide him with any expert assistance.

The federal government and a large majority of the States have acknowledged their responsibility to provide expert assistance to indigent criminal defendants in appropriate cases. But Oklahoma acknowledges no such responsibility. This Court should confirm that in proper cases the provision of such assistance is required by the Constitution.

2. In a capital case, the sentencing proceeding closely resembles a trial, and, like a trial, it must be a truly adversary proceeding. *Strickland* v. *Washington*, *supra*. Where expert assistance is required to make it so, the State must make such assistance available to indigent defendants for the reasons given above.

Moreover, where the State seeks to impose the penalty of death, it "is essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Barefoot* v. *Estelle*, 103 S.Ct.

3383, 3396 (1983). It is universally recognized that mental illness and its effects are mitigating circumstances that may move a jury to forego the death penalty. Refusing to provide an indigent defendant facing the death penalty with the means of presenting such information to the jury in a credible and intelligible manner makes it likely that he will be condemned to death *erroneously*—i.e., where a fully informed jury would not impose the death penalty.

The refusal to provide such assistance is even more egregious where, as here, the State relies on expert testimony to establish the aggravating circumstance of predictable future dangerousness, but the defendant is precluded by his poverty from rebutting that testimony with equally authoritative expert witnesses. Such a heavy thumb on the scales of justice—with a human life literally in the balance—cannot meet the standards of due process and equal protection.

3. Due process also precludes the trial of a person who cannot understand and participate intelligently in the proceedings against him. *Drope* v. *Missouri*, 420 U.S. 162 (1975); *Pate* v. *Robinson*, 383 U.S. 375 (1966). A court is required to make inquiry when a defendant's behavior or appearance raises a serious question of competency. *Id*. No inquiry was made here, although the judge himself acknowledged that the defendant's competency was doubtful. Tr. 495. This requires reversal.

Reversal is also required because, on this record, it is plain that the Thorazine being administered to the defendant rendered him so sedated or uninvolved in his surroundings that he was virtually absent from his own trial. And his drugged, "zombie"-like appearance and demeanor surely prejudiced him in the eyes of the jurors who held his fate in their hands.

ARGUMENT

I. WHEN AN INDIGENT DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY IN ISSUE, THE STATE MAY NOT DENY HIM THE MEANS TO ESTABLISH HIS INSANITY DEFENSE

In this case, an indigent defendant displaying obvious signs of severe and possibly long-standing mental illness at arraignment and at trial was denied *any* psychiatric examination directed to his sanity at the time of the crime. His entire defense case, the closing arguments of counsel, the jury's guilty verdict, the sentencing hearing and the jury's sentence of death took less than one trial day. Tr. 553-740. Such a proceeding does not comport with the guarantees of the United States Constitution.

The Oklahoma courts believed their procedures to be adequate under the rule of *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953). But *Baldi* did not approve such a complete denial of access to expert services; indeed, the decision relies upon the fact that a psychiatric examination *was* provided in that case. *See* 344 U.S. at 568. To the extent, if any, that *Baldi* stands for the proposition that a defendant can never have a constitutional right to expert assistance at State expense, it is inconsistent with the subsequent rulings of this Court and with the constitutional requirement of fundamental fairness in criminal trials, and should be overruled.

A. The Constitution Requires That Indigent Defendants Be Provided With Reasonably Necessary Expert Assistance.

This Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion). For this reason, the provision of assistance to indigent criminal defendants that is " 'fundamental and essential to a fair trial' is made obligatory upon the States" by the Due Process Clause of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U.S. 335, 342 (1963).

In a proper case, expert assistance is fundamental and essential to a fair trial. In such a case, the Constitution requires the States to make necessary expert assistance available to indigent criminal defendants.

In *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Court hypothesized "the extreme case of a prisoner charged with a capital offense, who is deaf and dumb [and] illiterate . . . prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result . . . would be little short of judicial murder." *Id.* at 72. The situation would be no different if counsel was appointed, but was not provided with the means—for example, a sign-language interpreter—by which to communicate with his client.

The same reasoning applies where the assistance of an expert is necessary to discover, analyze, and present to the judge or jury facts that are matters of specialized knowledge, or to explain facts, the significance of which will not otherwise be apparent to the lay person. "An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge." Fed. R. Evid. 702 advisory committee note. Even fifty-five years ago, it was

> a matter of common knowledge, that upon the trial of cer ain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.

Reilly v. *Barry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) (Cardozo, C.J.). Trial lawyers therefore understand that "[m]odern civilization, with its complexities of business, science and the professions, has made expert and opinion evidence a necessity." 2 I. Goldstein & F. Lane, *Goldstein Trial Techniques* § 14.01 (2d ed. 1969).

The fact that a government expert may have examined the defendant or the evidence does not satisfy the defendant's need

for expert assistance. In the first place, an independent expert may come to a different conclusion. *See* n. 12, *infra*; *cf. Watson* v. *Cameron*, 312 F.2d 878 (D.C. Cir. 1962) (persons confined in public mental hospital entitled to examination by outside expert) (Burger, J.). But the defendant's need for an expert is not based only on that possibility, important as it is. An expert serves many crucial purposes in litigation other than testifying at trial. At the very outset of a case, an expert may be necessary to evaluate the facts and lay a groundwork for future investigation and trial strategy. "[I]t may be impossible to properly conduct such an evaluation without expert assistance." D. Danner, *Expert Witness Checklists* 72 (1983). In a criminal case, such an evaluation may be essential in making an intelligent decision about whether to pursue or abandon certain lines of defense, or even in deciding whether to go to trial or to seek to negotiate a plea bargain. If the case goes forward, "counsel often needs an expert for assistance in becoming an expert in the field [himself], and then to understand the intricacies of the case sufficiently to try it successfully." *Id.* at 2. In helping the attorney prepare for trial, an expert will "advise counsel about the facts and theories that counsel may face from the opposing side." *Id.* at 41. She may be able to refer counsel to relevant studies and data not otherwise available to him, *id.* at 74, and can assist in preparing for the examination of witnesses—especially the cross-examination of the other party's experts. *Id.* at 72, 292. Indeed, one authority advises that it may be best not to cross-examine opposing experts *at all* when counsel "has failed to become somewhat of an expert on the subject himself by prior preparation, study and consultation with his own expert witnesses." *Goldstein Trial Techniques*, *supra*, at § 14.24.

Of course, the expert's role at the trial itself is also crucial. "Testimony emanating from the depth and scope of specialized knowledge is very impressive to the jury. The same testimony from another source can have less effect." F. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* 116 (1970). Thus, if "used properly, an expert may be *the most*

important tool to counsel in preparing the case for trial." D. Danner, *supra*, at 71-72 (emphasis added).

Denying an indigent defendant access to necessary expert assistance not only harms the defendant, but undermines the integrity of the truthfinding process and the reliability of the verdict. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975). The effective functioning of a true adversarial process is protected by the Sixth Amendment's guarantee of effective assistance of counsel. *United States* v. *Cronic*, No. 82-660, slip op. at 8 (U.S. May 14, 1984). "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 8-9.[11]

But the right to an effective counsel "is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires." *Bush* v. *McCollum*, 231 F. Supp. 560, 565 (N.D.

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[11] In addition to the guarantee of effective assistance of counsel, two other clauses of the Sixth Amendment presuppose the existence of a functioning adversary system: The defendant's rights "to be confronted by the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Like the right to assistance of counsel, these rights cannot be *effectively* implemented without providing necessary collateral services to indigent defendants. Without expert assistance and advice, the value of cross-examination in a case involving specialized testimony is questionable. *Goldstein Trial Techniques*, *supra*, at § 14.24. And without the funds to retain necessary experts, a defendant's right to compulsory process is reduced to "the shadow of the right . . . deprived of the substance." *People* v. *Watson*, 36 Ill. 2d 228, 233, 221 N.E.2d 645, 648 (1966) (holding the availability of compensated expert witnesses for indigent defendants to be constitutionally required). *See generally* Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 641-43 (1970).

Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965). This proposition is not just a matter of logic. In practice, the "inability to finance these [expert] expenses has led, with some frequency, to convictions later found to be erroneous." Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 Minn. L. Rev. 1054, 1060 (1963) (citing E. Borchard, *Convicting the Innocent* (1932) and J. Frank, *Not Guilty* (1957)).[12]

The legal profession has recognized that the proper functioning of the adversary system

> rests on certain basic assumptions: *first*, that an accused person is presumed innocent; *second*, that guilt must be established in an adversary proceeding . . .; and *third*, that the two adversaries may be aided by advocates capable of rendering *effective* assistance to the cause.

ABA Standards Relating to the Administration of Criminal Justice, Providing Defense Services, at 141 (1968) (final emphasis added). The third assumption, of effective representation, implies certain responsibilities:

> [f]or the representation provided to be effective, defense counsel must be provided with adequate resources for investigation and *the employment of experts to assist in preparation of the case.*

Id. at 143 (emphasis added). Thus the ABA Standards would require the government to "provide for investigatory, expert

[12] For example, in one murder case, state police fingerprint experts testified that a latent print lifted from the crime scene was defendant's. Court-appointed defense counsel was able to procure his own expert, who proved that the print was not the defendant's by showing three crucial points of dissimilarity. An acquittal followed. *See* Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 638 n.38 (1970).

and other services necessary to an adequate defense." *Id.* § 1.5.[13]

Congress has acknowledged the constitutional mandate to provide indigent criminal defendants with necessary expert assistance, and it has responded to that mandate. The Criminal Justice Act, 18 U.S.C. § 3006A (1983), was "designed to implement the sixth amendment guarantee of the assistance of counsel." *Proffitt* v. *United States*, 582 F.2d 854, 857 (4th Cir. 1978), *cert. denied*, 447 U.S. 910 (1980); *see* 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14224 (1963). Subsection (e) of that Act, 18 U.S.C. § 3006A(e), provides for the appointment and payment of experts "necessary to an adequate defense." Testifying in support of the proposed Act, the President of the American Bar Association underscored the vital nature of this provision:

> Even though [defense counsel] were zealous in performing their legal duties, without investigative services, when the assigned lawyer is met with all the prepared forces of the Government prosecution, they cannot meet it adequately.

Criminal Justice Act: Hearings on H.R. 1027 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 126 (1963) (testimony of Sylvester C. Smith, Jr.). In presenting the conference committee report on the bill, Senator Hruska indicated Congress' agreement:

> An adequate representation commonly entails more than the mere presence of a lawyer in court. To prepare his defense, he may need investigative, expert, or other services.

110 Cong. Rec. 18521 (1964).

Cognizant of the fact that expert assistance may be essential to the fair trial of some cases, eight of the United States Courts

[13] Then Circuit Judge Burger was Chairman of the ABA Advisory Committee that proposed this standard and prepared the accompanying statement. *See ABA Standards, Compilation* at 481 (1974).

of Appeals[14] and at least eighteen States[15] have recognized the constitutional necessity of providing expert assistance for indigent criminal defendants in proper cases. The scholarly commentators have uniformly called for the acknowledgment of this constitutional right.[16]

Sensitive to their underlying constitutional obligations, most States provide for the compensation of experts necessary to assist indigent criminal defendants. In addition to those States that have recognized a constitutional right to necessary expert assistance, *see* n.15, *supra*, at least nineteen States have followed the federal government's lead and provided by statute for the compensation of defense experts.[17] Such a na-

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[14] *See Williams* v. *Martin*, 618 F.2d 1021 (4th Cir. 1980); *Hintz* v. *Beto*, 379 F.2d 937 (5th Cir. 1967); *Matlock* v. *Rose*, 731 F.2d 1236, 1243-44 (6th Cir. 1984); *United States ex rel. Robinson* v. *Pate*, 345 F.2d 691 (7th Cir. 1965), *aff'd in part and remanded in part on other grounds*, 383 U.S. 375 (1966); *Ray* v. *United States*, 367 F.2d 258, 264 (8th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967); *Mason* v. *Arizona*, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975); *Burger* v. *Zant*, 718 F.2d 979, 981 (11th Cir. 1983), *vacated and remanded on other grounds*, 52 U.S.L.W. 3860 (U.S. May 29, 1984); *United States* v. *Decoster*, 624 F.2d 196, 210 (plurality), 277-79 & n.80 (dissent) (D.C. Cir. 1976) (en banc). *Cf. Christian* v. *United States*, 398 F.2d 517, 519 n.7 (10th Cir. 1968) (such a right may exist). And *see United States* v. *Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting), *vacated and remanded*, 352 U.S. 565 (1957).

[15] *See People* v. *Worthy*, 109 Cal. App. 3rd 514, 167 Cal. Rptr. 402 (1980); *State* v. *Clemons*, 168 Conn. 395, 363 A.2d 33, 38, *cert. denied*, 423 U.S. 855 (1975) (semble); *Pierce* v. *State*, 251 Ga. 590, 308 S.E.2d 367 (1983); *State* v. *Olin*, 103 Idaho 391, 648 P.2d 203, 207 (1982); *People* v. *Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966); *State* v. *Campbell*, 215 N.W.2d 227, 229 (Iowa 1974); *State* v. *Taylor*, 202 Kan. 202, 447 P.2d 806 (1968) (dicta); *Young* v. *Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979); *State* v. *Madison*, 345 So.2d 485, 490 (La. 1977); *State* v. *Anaya*, 456 A.2d 1255, 1261-62 (Me. 1983); *Commonwealth* v. *Bolduc*, 10 Mass. App. 634, 411 N.E.2d 483, 486 (1980) (semble); *State* v. *Rush*, 46 N.J. 399, 217 A.2d 441 (1966); *State* v. *Second Judicial District Court*, 85 Nev. 241, 453 P.2d 421 (1969); *People* v. *India*, 32 N.Y.2d 230, 298 N.E.2d 65, 67 (dicta), *cert. denied*, 414 U.S. 850 (1973); *State* v. *Parton*, 303 N.C. 55, 277 S.E.2d 410, 418 (1981); *Commonwealth* v. *Phelan*, 427 Pa. 265, 234 A.2d 540, 547 (1967), *cert. denied*, 391 U.S. 920 (1968); *State* v. *Murphy*, 89 S.D. 486, 234 N.W.2d 54, 56-57 (1975); *State* v. *Cunningham*, 18 Wash. App. 517, 569 P.2d 1211 (1977).

Several other States have suggested that they would recognize such a right, but without deciding the question. *See People* v. *McCrary*, 190 Colo. 538, 549 P.2d 1320, 1327 (1976); *Himes* v. *State*, 403 N.E.2d 1377, 1379 (Ind. 1980). And many of the States that have held the appointment of experts not to be required have done so on the ground that no adequate showing of need or prejudice was made in the particular case. *See, e.g., Thessen* v. *State*, 454 P.2d 341, 352-53 (Alaska 1969), *cert. denied*, 396 U.S. 1029 (1970); *State* v. *Chapman*, 365 S.W.2d 551 (Mo. 1963); *McKenzie* v. *Osborne*, 640 P.2d 368, 374-75 (Mont. 1981).

[16] *See* Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982); Note, *Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection*, 59 Wash. U.L.Q. 317 (1981); Note, *The Indigent Criminal Defendant and Defense Services, A Search for Constitutional Standards*, 24 Hastings L. J. 647 (1973); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632 (1970); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 Minn. L. Rev. 1054, 1060 (1963).

[17] *See* Ariz. Rev. Stat. Ann. § 13-4013(B) (1978); Cal. Penal Code § 987.9 (West Supp. 1984) (capital cases); Hawaii Rev. Stat. § 802-7 (1968); Ill. Rev. Stat. ch. 38, § 113-3(d) (West Supp. 1983) (capital cases); Iowa Code Ann. § 813.2 (West 1979); Kan. Stat. Ann. § 22-4508 (1981); Mass. Gen. Laws Ann. ch. 261, §§ 27A, 27C(4) (West Supp. 1984); Minn. Stat. Ann. § 611.21 (West Supp. 1984); Mo. Rev. Stat. § 600.150 (1978); Nev. Rev. Stat. § 7.135 (Supp. 1980); N.H. Rev. Stat. Ann. § 604-A:6 (1974); N.M. Stat. Ann. § 31-16-13 (1978); N.Y. County Law § 722-c (McKinney 1979); N.C. Gen. Stat. § 7A-454 (1981); Or. Rev. Stat. § 135.055(4) (Supp. 1981); Pa. Stat. Ann. tit. 19, § 784 (Purdon 1964 & Supp. 1983) (capital cases) (now super-

tionwide consensus "reflects, if it does not establish . . . the fundamental nature of that right." *Powell* v. *Alabama*, *supra*, 287 U.S. at 73. *Cf. Enmund* v. *Florida*, 458 U.S. 782, 789-97 (1982) (consensus of state legislatures "weigh[s] heavily" in determining the meaning of the Eighth Amendment). Oklahoma's adamant refusal to provide reasonably necessary expert services to indigent defendants—even in capital cases—is out of step with nationally shared norms of fair criminal procedure.[18]

The reasoning of this Court's prior decisions dealing with the rights of indigent criminal defendants logically encompasses a right to expert services that are necessary to a fair defense. *See, e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (right to trial transcript); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel at trial; *Douglas* v. *California*, 372 U.S. 353 (1963) (right to counsel on appeal); *Roberts* v. *LaVallee*, 389 U.S. 40 (1967) (right to transcript of preliminary hearing); *McMann* v. *Richardson*, 397 U.S. 759 (1970) (right to effective counsel); *Bounds* v. *Smith*, 430 U.S. 817 (1977) (right of prisoners to access to law libraries or professional assistance in habeas corpus proceedings). The common rationale of these cases is that indigent defendants and prisoners must have an "ade-

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seded by the establishment of a statewide public defender system, *see* Pa. Stat. Ann. tit. 16, § 9960 *et seq.*) (Purdon Supp. 1983); S.C. Code Ann. § 17-3-80 (Law. Co-op. 1976); Tex. Code Crim. Proc. Ann. art. 26.05 § 1 (Vernon 1979); W. Va. Code § 51-11-8 (1981).

Several additional States provide specifically for the compensation of defense psychiatrists in cases where the insanity defense is raised. *See* Fla. R. Crim. Pro. 3.216(a) (West Supp. 1983); Ind. Code Ann. § 35-5-2-2 (Burns 1975); Mich. Comp. Laws Ann. § 768.20a(3) (1982); Wash. Rev. Code §§ 10.77-020(2), 10.77.060 (1980).

[18] Oklahoma is not, however, altogether alone in its assertion that an indigent has no right to expert assistance. *See Dutton* v. *State*, 434 So.2d 853, 856 (Ala. Crim. App. 1983); *Davis* v. *State*, 374 So.2d 1293, 1298 (Miss. 1979); *State* v. *Williams*, 657 S.W.2d 405, 411 (Tenn. 1983); *Martin* v. *Commonwealth*, 221 Va. 436, 271, S.E.2d 123, 129-30 (1980).

quate and effective" (*Griffin*, 351 U.S. at 20) or "meaningful" (*Bounds*, 430 U.S. at 828) opportunity to litigate their claims. As we have shown, the assistance of an expert may in some cases be just as essential to a fair trial as the assistance of a professionally competent attorney or access to a transcript of prior proceedings. It therefore follows that the States are constitutionally obligated to provide expert assistance to indigent criminal defendants in such cases.

Indeed, that conclusion follows *a fortiori* from this Court's decision in *Little* v. *Streater*, 452 U.S. 1 (1981). In that case, the State assisted the plaintiff in bringing a paternity suit against the defendant, who was indigent. He requested the State to pay the cost of blood grouping tests that could exonerate him; the State refused. 452 U.S. at 3-5. This Court held that the defendant had a due process right to a State-funded blood test. *Id.* at 17. The Court reasoned that he had "substantial" interests at stake in the possibly forced imposition of familial bonds; that the risk of an erroneous determination in the absence of blood tests was "not inconsiderable"; and that the State's financial interest in avoiding payment was insufficient to overcome his interest in avoiding an erroneous adjudication of paternity. *Id.* at 13-16.

The same reasoning applies with even greater force in the context of a criminal prosecution, where the defendant's interest is in his liberty or even, as here, in his very life. To say that an erroneous determination brings about consequences that are both serious and irreversible is but to understate. Balanced against these interests and these consequences is only the State's interest in fiscal economy. As in *Little* v. *Streater* and as in the *Griffin-Douglas* line of cases, that interest "is hardly significant enough" to overcome the defendant's interests. *Little* v. *Streater*, *supra*, 452 U.S. at 16. Moreover, the State itself has a very strong interest in the fair and accurate adjudication of criminal cases. As this Court has reminded us:

> It is critical that the moral force of the criminal law not be diluted by a [process] that leaves people in doubt whether

> innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, 397 U.S. 358, 364 (1970). When expert analysis and testimony is absent from the trial of a case where it was necessary, there cannot be "utmost certainty"—or even much confidence—about the accuracy of the result. Where the absence of such analysis and testimony results only from the poverty of the defendant, it is constitutionally intolerable.

Oklahoma has recognized the necessity of expert services in the most meaningful manner—by providing for State payment of experts' fees *when the experts are hired by the prosecution*. Okla. Stat. tit. 20 § 1304(b)(3) (1980), App. 6a. The State's adamant refusal to provide necessary expert services to indigent criminal defendants—even in capital cases—ignores its constitutional obligation to provide equal justice under law.

B. An Expert Examination of Petitioner's Mental Condition At The Time Of The Offense Was Necessary In This Case.

Glen Ake's constitutional claim to a psychiatric examination on the question of his sanity at the time of the offense was well founded, for that question was seriously in issue and it required expert assistance to be properly determined.

Ake's mental state at arraignment was so obviously abnormal that the judge *sua sponte* ordered him committed for observation. He was found incompetent to stand trial, and six weeks later was rendered "competent" only by being sedated with large doses of Thorazine three times a day during the trial. The doctors who examined him all concluded that he was suffering from paranoid schizophrenia at a psychotic level. J.A. 33, 42, 49. Dr. Allan, a court-appointed psychiatrist who examined Ake to determine his competency to stand trial, testified that Ake's mental illness may have dated from childhood, and that the illness may have been "apparent" on the day of the crime. J.A. 38.

Under Oklahoma law, a defendant has only the burden of raising a reasonable doubt of his sanity at the time of the crime in order to put his mental condition in issue. *Ake* v. *State*, 663 P.2d at 10, J.A. 78. In light of this standard and the evidence just reviewed, Ake's mental condition—his only serious defense to these capital charges—was clearly in issue. The fact that no expert testimony was presented bearing more specifically on his mental state on the day of the crime is attributable solely to the State's refusal to provide the means for him to be examined on that subject by even a single psychiatrist or psychologist.[19]

The assistance of a psychiatrist or a psychologist will in most cases be essential to the fair preparation and presentation of an insanity defense. Just as there are "few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses," *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963), there are few—if any—pecunious defendants charged with capital crimes who would fail to obtain the services of a mental health professional to assist them if their only serious defense to those charges was a

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[19] The State's conduct in refusing to provide Ake with the means of obtaining a psychiatric opinion as to his sanity at the time of the crime, and then arguing to the jury that the absence of such testimony demonstrated that there was not even a reasonable doubt about his sanity (J.A. 55), cannot be squared with due process. In *Griffin* v. *California*, 380 U.S. 609 (1965), this Court held that the Fifth and Fourteenth Amendments were violated by a prosecutor's comment on a defendant's refusal to testify. And in *Doyle* v. *Ohio*, 427 U.S. 610 (1976), the Court ruled that comment on a defendant's silence at the time of arrest was a denial of due process. The injustice here is even more egregious, for Ake's failure to present psychiatric testimony about his mental condition at the time of the crime was not even his volitional choice. He did all he could to obtain such testimony. The State, which could have made such testimony possible, rebuffed his request, and then urged the jury to penalize Ake for its absence. On this ground alone, Ake's conviction should be reversed.

plea of insanity. As with counsel, this is "the strongest indication . . . that [experts] are necessities, not luxuries." *Id.*

In other contexts, the State of Oklahoma fully recognizes the necessity of psychiatric testimony when issues of mental condition are before its courts. In Oklahoma (as in most States) a person may not be civilly committed—a serious deprivation of liberty, but not comparable to a conviction for murder—based on lay testimony alone, but only after an examination by two qualified experts *who are paid a fee for their services by the State*. Okla. Stat. tit. 43A §§ 54.4(F), 56 (1980). And many States are so strongly of the view that a psychiatric examination is the only reliable means of determining a defendant's mental condition at the time of an alleged offense that they compel a defendant who raises the defense of insanity to submit to an examination by the government's expert. *See Estelle* v. *Smith*, 451 U.S. 454, 465 (1981) (citing cases).

The reasons why expert assistance is essential in preparing and presenting an insanity defense are not obscure. As this Court has noted, the symptoms of insanity are "elusive and often deceptive." *Solesbee* v. *Balkcom*, 339 U.S. 9, 12 (1950). The "common sense" of lay witnesses and jurors "may be the superficial rationalizations by which we avoid the real and deeper meanings of the human mind." But persons of intelligence "recognize this and are prepared to accept explanations of human behavior and natural phenomena that seem esoteric and enigmatic." Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 Mich. L. Rev. 1335, 1343 (1965).

Like an attorney, an expert psychiatrist or psychologist can provide indispensable assistance both before and during trial. Indeed, as with an attorney, pre-trial assistance may often be the more crucial. An expert is necessary not only to conduct an examination of the defendant, but to make the initial determination of what tests and examinations need to be conducted. Elements of a patient's medical or personal history that may seem insignificant to a lawyer may have great meaning to a psychiatrist or psychologist; without an expert's help, a

lawyer may not even know what questions to ask. *See* Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061, 1066 (1962). For similar reasons, the expert can enable the defense attorney better to anticipate the testimony of the prosecution experts, so as to prepare for cross-examination and rebuttal. F. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* 467 (1970).

And at trial, an expert can convey and explain his findings to the judge and jury in a manner that lay witnesses just cannot match. "All juries will be impressed by lucid explanations of the forces, drives and compulsions which affect the controls of an abnormal personality which has become separated from reality." *Blocker* v. *United States*, 288 F.2d 853, 864 (D.C. Cir. 1961) (Burger, J., concurring). But lucid explanations of such forces, drives and compulsions cannot be presented by lay witnesses who do not themselves have an educated understanding of such phenomena. In short, the defendant whose defense is insanity simply "cannot expect to succeed unless he can present an expert witness." Goldstein & Fine, *supra*, at 1063. As Justice Brennan once wrote, an attorney appointed to defend such a case without access to expert assistance can often do little but "throw up his hands in despair." Brennan, *Law and Psychiatry Must Join in Defending Mentally Ill Criminals*, 49 A.B.A.J. 239, 242 (1963).

In circumstances like these, the absence of an expert witness "goes to the very trustworthiness of the criminal justice process." *United States* v. *Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), *cert. denied*, 411 U.S. 984 (1973). Thus the Court's analysis in *Gideon* v. *Wainwright* and *Powell* v. *Alabama* applies cogently to this case, *mutatis mutandis*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to [expert assistance]. Even the intelligent and educated [attorney] has small and sometimes no skill in the science of [psychiatry]. . . . [H]e is incapable, generally, of determining for himself whether [the client was sane or insane at the

> time of the crime]. He is unfamiliar with the [necessary psychological and physiological tests]. Left without the aid of [an expert, his client] may be . . . convicted . . . on evidence [which could effectively have been rebutted]. He lacks both the skill and knowledge adequately to prepare his [client's] defense, even though he have a perfect one. He requires the guiding hand of [an expert] at every step in the proceedings against [his client]. Without it, though [the client] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon v. *Wainwright*, *supra*, 372 U.S. at 344-45, *quoting Powell* v. *Alabama*, *supra*, 287 U.S. at 68-69.

This Court and other courts have acknowledged the indispensability of mental health professionals in factfinding inquiries in their areas of expertise. In *Addington* v. *Texas*, 441 U.S. 418 (1979), a case involving the constitutional requirements for civil commitments—where only a person's liberty, not his life, is at stake—the Court evinced its awareness of the "subtleties and nuances of psychiatric diagnosis" which is largely "based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." 441 U.S. at 430. The Court therefore appreciated that the question

> [w]hether the individual is mentally ill . . . turns on the meaning of the facts *which must be interpreted by expert psychiatrists and psychologists.*

Id. at 429 (emphasis added).

Lower courts that have considered the question presented here—the necessity of psychiatric assistance in a criminal case where the defense is insanity—have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States* v. *Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974). Thus,

> a trial, without expert evidence as to sanity, which found [the defendant] sane and resulted in a life sentence is so lacking in fairness as to be a denial of liberty without due process of law.

Bush v. *McCollum*, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965). *Accord Proffitt* v. *United States*, 582 F.2d 854, 857 (4th Cir. 1978), *cert. denied*, 447 U.S. 910 (1980); *United States* v. *Lincoln*, 542 F.2d 746, 750 (8th Cir. 1976), *cert. denied*, 429 U.S. 1106 (1977); *United States* v. *Bass*, 477 F.2d 723, 725 (9th Cir. 1973); *United States* v. *Chavis*, 486 F.2d 1290, 1291 (D.C. Cir. 1973); *Brinks* v. *Alabama*, 465 F.2d 446 (5th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). The failure of defense counsel to request a psychiatric examination in such circumstances may amount to incompetent representation. *See Beavers* v. *Balkcom*, 636 F.2d 114 (5th Cir. 1981); *Ex Parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980); *People* v. *Bryant*, 77 Mich. App. 108, 258 N.W.2d 162 (1977).[20]

In a case much like this one, where a defendant had been convicted over a plea of insanity in a capital case without any psychiatric testimony as to his sanity at the time of the crime, the experienced trial judge commented:

> It seems to this Court difficult if not impossible to say what arguments, or theories, or defenses might have been developed with adequate expert assistance. Mr. Blake received the benefit of no expert help in the preparation of his defense and none in the testing of the prosecution's case. These circumstances seem to the Court to amount to

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[20] As noted above, the Oklahoma Court of Criminal Appeals found that Ake had not raised even a reasonable doubt of his sanity. It is hard to see what more Ake could have done to raise that issue without the help of an expert; *see* n.10, *supra*. It appears to be the case that Oklahoma in effect requires the testimony of an expert even to raise a reasonable doubt about sanity. *Cf. Bills* v. *State*, 585 P.2d 1366, 1371-72 (Okla. Crim. App. 1978) (trial court properly refused to give jury instruction on insanity because defendant, who had been admitted to mental hospital four times in six years prior to crime, had presented "no evidence" tending to rebut the presumption of sanity). The absence of fundamental fairness in refusing to provide psychiatric assistance to an indigent defendant in those circumstances is plain.

> a situation where essentially no defense at all [was] presented.

Based on this analysis, he concluded:

> [I]n a capital case, a defendant whose sanity at the time of the alleged crime is fairly in question, has *at a minimum* the constitutional right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information and at such a time as will permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense.

Blake v. *Zant*, 513 F. Supp. 772, 787 (S.D. Ga. 1981) (Edenfield, J.). While reversing on other grounds, the Eleventh Circuit specifically adopted these views as its own. *Burger* v. *Zant*, 718 F.2d 979, 981 (11th Cir. 1983), *vacated and remanded on other grounds*, 52 U.S.L.W. 3860 (U.S. May 29, 1984).

Bush v. *Texas*, 372 U.S. 586 (1963), in which this Court previously granted certiorari on the same question presented here, exemplifies the difference that a proper expert examination can make. James Bush, an indigent, was tried and, over his plea of insanity, convicted of theft and incarcerated. As in this case, the trial court had refused to provide any psychiatric examination with respect to his sanity at the time of the offense. *Bush* v. *State*, 172 Tex. Crim. 54, 353 S.W.2d 855 (1962). Two years later, virtually on the eve of argument in this Court, the State of Texas finally had Bush examined by a psychiatrist. The finding of that examination was that Bush "was only partly or not at all responsible for his acts, for very many years." 372 U.S. at 589. Upon Texas' representation that Bush would be granted a new trial at which the psychiatric evidence would be available, the case was remanded. *Id.* at 590. Had such an examination been made available to Bush before his trial, it is more than likely that he would not have spent those two years at a Texas prison farm.[21]

[21] In fact, Bush was not afforded a new trial on remand. His subsequent petition for a writ of habeas corpus was granted by the United States District Court. *Bush* v. *McCollum*, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965).

A belated psychiatric examination was able to establish James Bush's insanity at the time of the offense. But this will not always be the case. Like the justice lost by the absence of counsel before and at trial, the justice lost by the absence of necessary expert assistance cannot easily be recovered in post-conviction proceedings. The sooner after the relevant events a mental examination is performed, the more reliable it will be. *See Wright* v. *United States*, 250 F.2d 4, 8-9 (D.C. Cir. 1957); *cf. Drope* v. *Missouri*, 420 U.S. 162, 183 (1975). Providing indigent defendants whose sanity is seriously in issue with prompt expert examination on that question will not only provide greater protection for the constitutional rights of the accused, but will substantially serve the basic "function of the legal process . . . to minimize the risk of erroneous decisions." *Addington* v. *Texas*, 441 U.S. 418, 425 (1979). And it will improve the ability of the States to obtain final and constitutionally valid convictions in cases where the accused is in fact guilty. For when a criminal trial properly "concentrates society's resources at one 'time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence,' " then the likelihood that there will have to be a retrial, with its attendant social costs, will be minimized. *Engle* v. *Isaac*, 456 U.S. 107, 127-28 (1982), quoting *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). In the long run, justice will be made more speedy, more certain, and less expensive to the States if indigent defendants are provided with necessary expert assistance before trial. *See Brief for the State of Oregon as Amicus Curiae*, *Gideon* v. *Wainwright*, No. 155, O.T. 1962.

In this case, the trial court and the State of Oklahoma relied on this Court's decision in *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953), for the proposition that there is "no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense." Opposition to Petition for Writ of Certiorari at 8; J.A. 20 (trial court).

But *Baldi* cannot stand for that proposition, for in *Baldi* a court-appointed psychiatrist *did* examine the defendant as to his mental state at the time of the crime, and testified on that subject at trial. 344 U.S. at 568. This fact appears to have been

crucial to the Court's holding that no *further* psychiatric assistance to the defendant was required. *Id.* As noted above, Ake moved in the alternative for such an examination, but he was denied even that. *See* n.4, *supra*. Thus, *Baldi* can provide no support for an affirmance here, since in this case there was never any examination of the defendant with respect to his mental condition at the time of the crime by anybody—a point the prosecution emphasized and reemphasized to the jury in arguing that Ake's insanity defense should fail. J.A 55.

In *Baldi* the Court said: "Psychiatrists testified. That suffices." 344 U.S. at 568. But surely it would not have sufficed if their testimony had consisted, like that of the doctors here, only of statements that they had made no examination and had no opinion on the issue before the court.

Baldi may stand for the proposition that where a defendant has been examined by a neutral, court-appointed expert, he is not constitutionally entitled to the appointment or payment of an additional expert to assist *him* in his defense. But *Baldi* was decided at a time when indigent defendants in State courts had no constitutional right even to counsel. *See Betts* v. *Brady*, 316 U.S. 455 (1942). The law of due process and equal protection has developed considerably since that time. *See, e.g., Gideon* v. *Wainwright, supra, overruling Betts* v. *Brady*. Judge Wisdom was therefore clearly correct when he observed that *Baldi* has been "severely undercut" by this Court's decisions since *Griffin* v. *Illinois, supra*. *Pedrero* v. *Wainwright*, 590 F.2d 1383, 1390 n.6 (5th Cir.), *cert. denied*, 444 U.S. 943 (1979).

This case squarely presents the question whether an indigent criminal defendant is constitutionally entitled to expert assistance reasonably necessary to his defense. Such assistance was manifestly necessary in this case, and was denied—perhaps at the cost of the defendant's life. For all the reasons presented above, the Court should take this occasion to hold that the Constitution guarantees such assistance when it is necessary to a fair trial. To the extent, if any, that the decision

in *United States ex rel. Smith* v. *Baldi* is inconsistent with that proposition, it should be overruled.[22]

II. IN A CAPITAL CASE, THE STATE MAY NOT DENY AN INDIGENT DEFENDANT THE MEANS OF PRESENTING EVIDENCE IN MITIGATION OF PUNISHMENT AND IN REBUTTAL OF THE STATE'S EVIDENCE OF AGGRAVATING CIRCUMSTANCES

Because "a consistency produced by ignoring individual differences is a false consistency," *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982), this Court has rigorously insisted that there be an individual sentencing procedure in each capital case which "*ensures* that the sentencing authority is given adequate information" about the offender. *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976)(emphasis added). As the Court has explained, " 'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a con-

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[22] Our submission is not that State-paid experts should be available to indigent defendants on demand, or that the Constitution requires the States to provide indigents with the same quantum of assistance that a millionaire might choose to mobilize for his defense. We suggest that the Criminal Justice Act's constitutionally-grounded standard of assistance "necessary to an adequate defense," 18 U.S.C. § 3006A(e) (1983), and the workable criteria developed by the federal courts (and by many State courts operating under similar statutes, *see* n.17, *supra*) to implement that standard, may appropriately be applied to implement the constitutional guarantee of due process. *See, e.g., United States* v. *Theriault*, 440 F.2d 713, 716-17 (5th Cir. 1971) (Wisdom, J., concurring) (indigent defendant entitled to such expert assistance as a reasonable attorney would engage for a client who could affird to pay for it), *cert. denied*, 441 U.S. 984 (1973); *United States* v. *Bass*, 477 F.2d 723, 725 (9th Cir. 1973) (adopting this standard); *Brinkley* v. *United States*, 498 F.2d 505, 508-10 (8th Cir. 1974) (same). *Compare United States* v. *Durant*, 545 F.2d 823 (2d Cir. 1976) (appointment of expert was required where fingerprint evidence was pivotal and was subject to dispute), *with United States* v. *Harris*, 542 F.2d 1283, 1315 (7th Cir. 1976) (use of psychologist to assist in jury selection not necessary to an adequate defense).

stitutionally indispensable part of the process of inflicting the penalty of death.' " *Eddings* v. *Oklahoma*, *supra*, at 112, quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). Just last Term, the Court emphasized that

> what is *essential* is that the jury have before it *all possible relevant information* about the individual defendant whose fate it must determine.

Barefoot v. *Estelle*, 103 S.Ct. 3383, 3396 (1983), quoting *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (emphasis added).

In this case the jury did not receive essential information about defendant Ake's character and personality, because of the State's refusal to provide him with the expert assistance necessary for the preparation and presentation of such information.

The denial of Ake's motion for a psychiatric examination disadvantaged him at his sentencing hearing in two ways: he was unable to put before the jury as mitigating evidence any testimony about his mental condition at the time of the crime or about the psychological effects of the child abuse he had suffered at the hands of his father, and he was unable to rebut the State's evidence, presented through the testimony of psychiatrists, that he was highly likely to commit future acts of violence.[23]

The sentencing "hearing" in this case was really no hearing at all. The defense rested about thirty seconds after the State rested. Tr. 703-04. Without access to expert assistance, the defendant was unable to present to the jury the kind of information that this Court has properly regarded as essential to a "measured, consistent application" of the death penalty. *Eddings* v. *Oklahoma*, *supra*, 455 U.S. at 111.

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[23] Ake was unable to testify in his own behalf on these subjects, apparently because of the sedating effects of the Thorazine with which he was being treated. *See* Part III, *infra*.

A. An Indigent Defendant Facing The Death Penalty Is Entitled To Reasonably Necessary Expert Assistance To Prepare And Present Evidence In His Favor At The Sentencing Hearing.

"Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence are unavailable." *Westbrook* v. *Zant*, 704 F.2d 1487, 1496 (11th Cir. 1983).

Expert assistance is no less essential, and therefore must be no less available, at a sentencing hearing than it is at trial. As this Court recognized just last month:

> A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

Strickland v. *Washington*, No. 82-1554, slip. op. at 16 (U.S. May 14, 1984).

Evidence about the defendant's mental state at the time of the crime is highly relevant at sentencing. Three of the potentially mitigating circumstances that are specifically recognized in Oklahoma relate to the defendant's state of mind: whether he was "under the influence of extreme mental or emotional disturbance," whether he "believed [that there was] a moral justification or extenuation for his conduct," and whether his "capacity . . . to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law was impaired as the result of mental disease or intoxication." Tr. 725-26.[24] One or more of these circumstances may well have been present in this case, *see id.*, but without the assistance of a psychiatrist or psychologist to examine Ake on

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[24] State statutes that specify mitigating factors which must be considered by the sentencing authority "invariably" include mental disorder. Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Georgetown L. J. 737, 795 (1978).

these points and to present her findings in court, the evidence of these mitigating circumstances—whatever it may have been—was never even discovered, much less provided to the jury.

In a case like this, "it is clear that the defendant's case-in-mitigation—if there is to be one at all—must be built on a foundation of psychiatric testimony." Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 Va. L. Rev. 167, 181 (1980). As at the first stage of the trial, the absence of such testimony goes directly to the accuracy and objectivity of the decision-making process. As Oklahoma recognizes by the specific inclusion of these mitigating circumstances in a judge's charge to a sentencing jury, it might well be a miscarriage of justice to execute a person who, although not legally insane at the time of the crime, was under extreme mental disturbance or had diminished mental capacities. *See Cox* v. *State*, 644 P.2d 1077, 1079 (Okla. Crim. App. 1982).[25] And, as Oklahoma concedes, "[p]sychiatric testimony of the defendant's mental or emotional state at the time of the killing *may very likely influence the jury's decision*." *Id.* (emphasis added). Yet by refusing to provide an indigent defendant with the services of a person expertly qualified to diagnose and explain such mental and emotional states, Oklahoma virtually guarantees that the jury will *not* have access to the evidence most relevant to those considerations. In these circumstances, the State's refusal is a denial of due process. *State* v. *Wood*, 648 P.2d 71, 87-88 (Utah), *cert. denied*, 103 S.Ct. 341 (1982).

In Oklahoma, the prosecutor must make a discretionary decision whether to seek the death penalty. Tr. 717. Here the State made the decision to seek Glen Ake's death, and also decided to refuse him the resources with which to show that,

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[25] In this case, however, the prosecution argued to the jury (when there was no longer any opportunity for rebuttal) that in rejecting Ake's insanity defense they had necessarily rejected any mitigating circumstance based on mental illness or diminished capacity. *See* Tr. 730.

under the State's own standards, he did not deserve that ultimate penalty.

If Glen Ake had been able to afford an expert witness, his sentencing hearing could have been a meaningful proceeding. Deprived of assistance, it was but a "meaningless ritual." *Douglas* v. *California*, *supra*, 372 U.S. at 358.

B. Where The State Uses Psychiatric Testimony To Establish The Aggravating Circumstance Of Predictable Future Violence, It May Not Deny An Indigent Defendant Psychiatric Assistance To Rebut That Testimony.

In *Barefoot* v. *Estelle*, 103 S.Ct. 3383 (1983), this Court ruled that psychiatric testimony by the State on the question of future dangerousness was acceptable evidence at a capital sentencing hearing. In the Court's view, "jurors should not be barred from hearing the views of the State's psychiatrists along with the opposing views of the defendant's doctors." 103 S.Ct. at 3397.

Here, the jurors were effectively barred from hearing the views of the defendant's doctors to rebut the condemning expert opinions offered by the State, because the defendant could not afford to hire a doctor and the State would not assist him in obtaining one.[26]

Oklahoma relied on the doctors' testimony to argue that Ake, if allowed to live, would predictably commit future acts of criminal violence. Tr. 714, 717. It is impossible to know whether Ake could have obtained a contrary expert opinion from a different psychiatrist. He—and the jury—were never given an opportunity to find out.

Mindful that there is "a qualitative difference between death and any other permissible form of punishment," this Court has

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[26] In *Barefoot*, the Court noted that Texas provided payment for expert testimony in cases of indigence, and that there was thus no contention that the State had refused to provide an expert for the defendant. 103 S.Ct. at 3397 n.5. This case thus presents the question not raised in *Barefoot*.

affirmed that " 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Zant* v. *Stephens*, 103 S.Ct. 2733, 2747 (1983), quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). Denying Ake's motion for psychiatric assistance[27] created a strong risk that the jury would impose the death penalty despite the existence of factors—unknown to them—that would call for a less severe penalty.

"When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion of Burger, C.J.).

III. PETITIONER'S DRUGGED CONDITION DURING TRIAL DEPRIVED HIM OF THE ABILITY TO ASSIST COUNSEL AND PREJUDICED HIM IN THE EYES OF THE JURY

Throughout his trial, Ake was medicated with Thorazine, administered in doses of 200 milligrams, three times a day. J.A. 26, 49, 52; *Ake* v. *State*, 663 P.2d 1, 6, J.A. 71. Ake "stared vacantly ahead throughout the trial," *Id.* at 7 n.5, J.A. 73. He remained mute and did not speak with his attorneys. *Id.* at 6, J.A. 71. He did not testify at the trial or at the sentencing hearing.

Unable to ignore these facts, the Court of Criminal Appeals avoided their implications by hypothesizing, without any record support and contrary to the unequivocal testimony of the State's own Chief Forensic Psychiatrist, J.A. 48, 51, that Ake might have been feigning mental illness to bolster his insanity defense. 663 P.2d at 7 n.4, 8, J.A. 72, 74. It is far more likely, however, that Ake was simply displaying the effects and side

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[27] Ake's motion was not directed specifically at the sentencing proceedings, but the jury, at the penalty stage, may consider the psychiatric evidence presented at the first stage of the trial as a mitigating factor. *See Smith* v. *Estelle*, 445 F. Supp. 647, 664 (N.D. Tex. 1977), *aff'd*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981).

effects of the Thorazine he was being given. These effects and side effects were, in this case, incompatible with competency to stand trial or with a fair trial by jury.

Thorazine is a strong psychoactive drug widely used in the treatment and control of persons suffering from schizophrenia. Levitt & Krikstone, *The Tranquilizers*, in *Psychopharmacology: A Biological Approach* 117, 126, 131 (R. Levitt ed. 1975). In many cases, its effect is highly therapeutic, reducing hostility and agitation, holding delusions and hallucinations in remission, and generally allowing a patient's thought processes to become reorganized. *Id.* at 131; J. Neale & T. Oltmanns, *Schizophrenia* 410 (1980). It is also true, however, that the simple control of behavior remains a major purpose for its use. *In re Roe*, 383 Mass. 415, 421 N.E.2d 40, 53 (1981); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U. L. Rev. 461, 478 (1977).

For some patients, discontinuance of medication will lead to a reappearance of their psychotic symptoms, so that trial would be impossible *except* under medication. Scrignar, *Tranquilizers and the Psychotic Defendant*, 53 A.B.A.J. 43, 44 (1967); Winick, *Psychotropic Medication and Competence to Stand Trial*, 3 Am. Bar. Foundation Research J. 769, 772-73 (1977). In many cases, then, it may be in the best interest of a criminal defendant, as well as society, for a person accused of crime to stand trial while receiving psychoactive medication. Particularly in non-capital cases, where the defendant's choice may be between incarceration for a term of years (if convicted) and indefinite commitment to a mental hospital, the risk of standing trial under medication may be neither unfair nor unwelcome to the defendant. *See* Winick, *supra*, at 789-93; R. Roesch & S. Golding, *Competency to Stand Trial* 39-43 (1980).

In some cases, however, the effects of drug treatment will be incompatible with trial. *See id.* at 42. This was such a case.

A. The Trial Court Failed To Inquire Into Petitioner's Competency When Such An Inquiry Was Constitutionally Required.

In *Drope* v. *Missouri*, 420 U.S. 162 (1975), and *Pate* v. *Robinson*, 383 U.S. 375 (1966), this Court ruled that a person who cannot understand and participate intelligently in the proceedings against him may not be put to trial.

Petitioner, who had been adjudged incompetent to stand trial in April, was returned to the court as "competent" in May after the administration of Thorazine. J.A. 3, 16. No judicial finding was ever made that he had regained competency and no inquiry was ever made into the cause of his appearance and conduct at trial. Had such an inquiry been made, it would have disclosed that he was far from competent.

The trial judge in this case was not unaware of the facts. Ake's counsel alerted him to their client's inability to communicate, *see, e.g.*, J.A. 26-27; the judge himself observed on the record that there was "all along a real question as to whether the man [Ake] had any kind of mental capacity." Tr. 495. It was the court's constitutional duty "to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." *Drope*, *supra*, at 172. Yet the court failed to conduct any inquiry into Ake's competency. Such a failure to inquire where, as here, the circumstances "created a sufficient doubt of [Ake's] competence to stand trial to require further inquiry," *Drope*, 420 U.S. at 180, denied Ake a fair trial and mandates that his conviction be reversed. *Id.* at 183; *Pate* v. *Robinson*, *supra*, at 386-87.[28]

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[28] Before the trial began, Ake's counsel withdrew their motion for a jury trial on the issue of competency. Tr. 3-4. But this did not diminish the court's obligation to inquire into the defendant's competency if the circumstances warranted. *Pate*, 383 U.S. at 384-86; *Drope*, 420 U.S. at 176, 180.

Under Oklahoma law, a court is now authorized by statute "at any time [to] initiate a competency determination on its own motion,

B. Petitioner's Competency To Stand Trial Cannot Be Sustained On This Record.

One prominent side effect of Thorazine—observed in a majority of patients—is drowsiness or sedation. J. Neale & T. Oltmanns, *Schizophrenia* 412 (1980). While many patients develop a tolerance for the sedative effects of the drug after several weeks, some do not; patients "are often seen to be docile, apathetic, and lacking in motivation." T. DuQuesne & J. Reeves, *A Handbook of Psychoactive Medicines* 356 (1982). "[E]ven typical therapeutic dosages may be highly sedating for several hours. This could cause problems at trial if the drugs were administered to the defendant on the typical three- or four-times-a-day schedule." Winick, *Psychotropic Medication and Competence to Stand Trial*, 3 Am. Bar Foundation Research J. 769, 783 (1977).

A closely related side effect is a patient's subjective feeling of isolation and uninvolvement. He may feel "boredom, lethargy, docility and purposelessness." Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 Wisc. L. Rev. 497, 512. Memory, reasoning ability, and mental speed may all be impaired. *Id.* As one former mental patient described his experience:

> On Thorazine everything's a bore. Not a bore exactly. Boredom implies impatience. You can read comic books and "Reader's Digest" forever. You can tolerate talking to jerks forever. Babble, babble, babble. The weather is dull, the flowers are dull, nothing's very impressive. Muzak, Bach, Beatles, Lolly and the Yum-Yums, Rolling Stones. It doesn't make any difference.

M. Vonnegut, *The Eden Express* 252-53 (1975).[29] A defendant who is in a condition of such sedation, or of such unconcern

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without an application, if the court has a doubt as to the competency of the [defendant]." Okla. Stat. tit. 22 § 1175.2 (1980). This statute became effective on June 25, 1980, while Ake's trial was underway.

[29] This indifference to the outside world may be pronounced. In one study, rats that had been trained to climb a pole at the sound of a

about what is going on around him, can hardly "consult with counsel, and . . . assist in preparing his defense"—the minimal prerequisites of competency to stand trial. *Drope* v. *Missouri*, *supra*, at 171.

It has been suggested that "these problems could be eliminated or reduced (without any loss of clinical benefit) by administering the total daily dose of the drug at bedtime." Winick, *supra*, at 783.[29] But this technique was not used here. Rather, Ake continued to receive his Thorazine three times a day throughout the trial, with evident sedative effects.

The State appellate court's cursory rejection of Ake's claim of incompetence is not dispositive, especially where, as here, it was based on sheer speculation. Rather, "it is 'incumbent upon [this Court] to analyze the facts in order that the appropriate enforcement of the federal right may be assured.' " *Drope* v. *Missouri*, *supra*, at 175, quoting *Norris* v. *Alabama*, 294 U.S. 587, 590 (1935). On this record, the Court of Criminal Appeals could not rationally have concluded that Ake's competency at trial was established.

C. The Side Effects Of The Drug Administered To Petitioner Prejudiced Him Before The Jury.

Equally serious as the likelihood that Ake was incompetent to stand trial is the likelihood that Ake was prejudiced in the

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buzzer in order to avoid an electric shock took no notice of the buzzer after being administered a very small dose of Thorazine. *See* R. Julien, *A Primer of Drug Action* 129 (1975).

[29] Because Thorazine is intrinsically long-acting, there is "no clinically significant difference in the therapeutic effect" between a single dose of 600 mg. at bedtime and doses of 200 mgs. three times a day. G. Honigfeld & A. Howard, *Psychiatric Drugs* 24, 147 (2d ed. 1978). Even where competence to stand trial is not a concern, it is good medical practice, once the patient has been stabilized, to administer a single daily dose in the evening. L. Hollister, *Clinical Pharmacology of Psychotherapeutic Drugs* 162-63 (1978); E. Bassuk & S. Schoonover, *The Practitioner's Guide to Psychoactive Drugs* 118 (1977).

eyes of the jurors because of the effects of the Thorazine—at the cost of his life.

In addition to his sedated condition, some of the symptoms Ake apparently displayed at trial are among the common extrapyramidal (central nervous system) side effects of Thorazine treatment, known as parkinsonisms: muscular rigidity, a stooped posture, motor retardation, a "mask-like" face. T. DuQuesne & J. Reeves, *A Handbook of Psychoactive Medicines* 357 (1982); *In re Roe*, *supra*, 421 N.E.2d at 53-54; *In re K.K.B.*, 609 P.2d 747, 748 n.3 (Okla. 1980); 5 R. Herrington & M. Lader, *Handbook of Biological Psychiatry* 91 (1981). At the dosage level being administered to Ake, these side effects are observed in 15% to 25% of patients. *Id.*

Counsel's references to Ake's "zombie"-like appearance, J.A. 26, Tr. 659, 661, coincide precisely with the medical observations:

> [O]ne should not only watch for the conventional parkinsonian symptoms . . . but also be aware that patients who appear apathetic, . . . lifeless, *zombie-like*, or drowsy, may be demonstrating subtle extrapyramidal side effects.

Davis, *Antipsychotic Drugs*, in 3 *Comprehensive Textbook of Psychiatry* 2257, 2281 (H. Kaplan, A. Freedman & B. Sadock 3rd ed. 1980) (emphasis added).

> [T]hese patients *sometimes appear "zombie-like"* because of the neurological side effects of these drugs.
>
> . . .
>
> One symptom that is often misperceived as evidence of psychopathology is actually an extrapyramidal side effect called akinesia, wherein the patient feels apathetic and is reluctant to move his body. *This syndrome in fact may account for the "zombie" look frequently seen among patients at psychiatric hospitals.*

G. Honigfeld & A. Howard, *Psychiatric Drugs* 16, 25 (2d ed. 1978) (emphasis added).[31]

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[31] Just as there are clinical techniques that can be used to ameliorate the sedative effects of Thorazine, *see* n.30, *supra*, it is possible to

A defendant's appearance and demeanor in the courtroom are always an important part of his case. *Criminal Defense Techniques* § 24A.03[3] (S. Bernstein ed. 1983); F. Bailey & H. Rothblatt, *Fundamentals of Criminal Advocacy* § 154 (1974). *Cf. Estelle* v. *Williams*, 425 U.S. 501, 504-05 (1976) (appearance of defendant in prison garb "may affect a juror's judgment"). Never is this more true than where the defense is insanity. In such a case, the defendant's appearance and demeanor is itself a matter of probative value for the jury:

> [H]is deportment, demeanor and day-to-day behavior during that trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justifiability of his defense of insanity.

In re Pray, 133 Vt. 253, 336 A.2d 174, 177 (1975). *Accord State* v. *Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971) (reversing conviction when defendant was administered tranquilizers during trial where his sanity was in issue).

The defendant's appearance and demeanor are equally if not more important at the sentencing stage. In *State* v. *Murphy*, 56 Wash. 2d 761, 355 P.2d 323 (1960), a defendant in a capital case was granted a new trial because he had been tried in a drugged condition. The *Murphy* court recognized that the demeanor of a defendant could influence the jury in assessing whether to impose the death penalty:

> the matter of the life or death of the accused may well depend upon the attitude, demeanor and appearance he

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eliminate or reduce these extrapyramidal side effects by switching the patient from Thorazine to another psychoactive drug, or by administering anti-parkinsonian drugs. *See* Greenblatt, Shader & DiMascio, *Extrapyramidal Effects*, in *Psychotropic Drug Side Effects* 92, 94-95 (R. Shader & A. DiMascio eds. 1977); Hollister, *Psychopharmacology*, in *Schizophrenia: Science and Practice* 152, 163 (J. Shershow ed. 1978). The record indicates that these techniques were not attempted here. *See* J.A. 16. Had a psychiatrist been appointed to assist the defendant, he or she might have been able to suggest the use of such measures.

> presents to the members of the jury. [This requires] careful judicial scrutiny of every aspect of the trial afforded to the accused to the end that a new trial be granted in the event of a showing by the accused of a reasonable possibility that his attitude, appearance, and demeanor, as observed by the jury, have been substantially influenced or affected by circumstances over which he had no real control.

Id. at 327. Glen Ake's "zombie-like" appearance before the jury while drugged denied him a fair chance for the jury to "assess [his] demeanor and character." *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 (1973). Indeed, the Thorazine he was forced to take very likely prevented him from—or made him too lethargic or unconcerned to care about—testifying before the jury. *See* J.A. 55 ("We cannot get a yes or no if he wants to take the stand, so we rest.").

In a capital case, the interest of society in bringing an accused person to trial, and the interest of the defendant in having an opportunity to establish his innocence, cannot justify the risk that a man will be sent to his death because the side effects of the drugs that are being administered to him without his consent have made the jury believe that he has no interest in his case, no remorse for his crime, and, perhaps, is a "zombie" without a soul.

CONCLUSION

For the foregoing reasons, the judgment of the Oklahoma Court of Criminal Appeals should be reversed, and the case remanded for a new trial.

Respectfully submitted,

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APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in pertinent part:

* * * No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The laws of Oklahoma provide:

Okla. Stat. tit. 21 § 701.7 (1980): **Murder in the first degree.**

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Okla. Stat. tit. 21 § 701.9 (1980): **Punishment for murder.**

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Okla. Stat. tit. 21 § 701.10 (1980): **Sentencing proceeding—Murder in the first degree.**

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. tit. 21 § 701.11 (1980): **Instructions—Jury findings of aggravating circumstance.**

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a

reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. tit. 21 § 701.12 (1980): **Aggravating circumstances.**

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Okla. Stat. tit. 21 § 701.13 (1980): **Death Penalty—Review of sentence**

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice

shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Okla. Stat. tit. 21 § 701.14 (1980): **Appointment of counsel—Fees.**

> In all cases, wherein the defendant is subject to the death penalty triable in the State of Oklahoma, where it is satisfactorily shown to the trial court that the defendant has no means and is unable to employ counsel, the court shall, in all such cases, where counsel is appointed and assigned for defense, allow and direct to be paid from the State Judicial Fund, a reasonable and just compensation to the attorney so assigned for such services as they may render such compensation being allowable in any court of record. Provided, however, that such attorney shall not be paid a sum to exceed Two Thousand Five Hundred Dollars ($2,500.00) in any one case, the specific amount to be left to the discretion of the trial judge.

Okla. Stat. tit. 20 § 1304 (1980): **Claims allowable—Approval—Limitation on courthouse building.**

> (a) Claims against the court fund shall include only such expenses as may be lawfully incurred for the operation of the court in the county.* * *
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> (b) The term "expenses" shall include the following items and none others:
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> (3) juror and witness fees * * * except that expert witnesses who appear on behalf of the State of Oklahoma shall be paid a reasonable fee for their services from the court fund;
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> * * *
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> (8) attorney's fees for indigents in the trial court and on appeal;
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> * * *

Okla. Stat. tit. 22 § 1171 (1971): **Doubt as to present sanity prior to calling of indictment or information for trial or preliminary hearing.***

> If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and prior to the calling of an indictment or information for trial or preliminary hearing, a doubt arises as to his present sanity, either such individual or the district attorney may make application to the District Court for an order committing such individual to a state hospital within the Department of Mental Health for observation and examination for a period not to exceed sixty (60) days. Provided, however, where an adequate examination can be had in the county where the charge is pending, such examination shall be held in such county. Provided, however, the court may extend the sixty-day period where a need for such extension is shown. Any criminal proceedings against such individual shall be suspended pending the hearing of the application by the District Court.

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*Repealed by Laws 1980, c. 336, § 10, effective June 25, 1980. Replaced by Okla. Stat. tit. 22 §§ 1175.1 to 1175.8 (1980), effective June 25, 1980.